No. 82-1128

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

IVAN PAVKOVIC, Director, Illinois Department of Mental Health and Developmental Disabilities,

Petitioner,

vs.

ROBERT TIDWELL, et al.,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH COURT

Lowell E. Sachnoff
One IBM Plaza
Chicago, Illinois 60611
(312) 644-2400

Of Counsel:

Andrew M. Schatz
Fay Clayton
William H. Taylor II
SACHNOFF WEAVER & RUBENSTEIN, LTD.
One IBM Plaza
Chicago, Illinois 60611
(312) 644-2400

Kathleen C. Yannias
CHICAGO LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, INC.
220 South State Street
Chicago, Illinois 60604
(312) 939-5797

Counsel for Respondents

CHAS. P. YOUNG CHICAGO, INC.

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Did the respondent mental patients who were subjected to a system by which the State of Illinois diverted their Social Security Disability Benefits to its own use, and who were injured in fact by the actual confiscation of these benefits by the State, have standing to challenge the legality of that system of confiscation, as the district court found and the court of appeals affirmed?

2. Did Form 623, which failed to disclose to the patient that the Form could be revoked at any time, and which failed to disclose that it covered Social Security Disability Benefits which, but for the Form, the patient would have no obligation to use to pay for State institutional charges, constitute an involuntary and illegal transfer or assignment in violation of 42 U.S.C. § 407, as the district court held and the court of appeals affirmed?

3. May respondents recover their attorneys fees under 42 U.S.C. § 1988 for all necessary litigation efforts against the petitioner which achieved the successful result of terminating the petitioner's use of a system of confiscating Social Security Disability Benefits by utilizing both an illegal representative payee procedure and an illegal assignment form, as the district court ruled and the court of appeals affirmed?

4. Where all fees solely attributable to the federal defendants have previously been eliminated from the fee request, can the Equal Access to Justice Act be used to deny respondents their fees against the State of Illinois?

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

IVAN PAVKOVIC, Director, Illinois Department of Mental Health and Developmental Disabilities,

Petitioner,

vs.

ROBERT TIDWELL, et al.,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH COURT

STATEMENT OF THE CASE

This lawsuit was filed to obtain relief for a class of mental patients confined in Illinois mental institutions whose Social Security Disability Benefits were being illegally confiscated by the State. The Complaint challenged the practice of seizing these Benefits and applying them to pay state institutional charges.

Asking for injunctive and declaratory relief from both the State of Illinois, which illegally sought, received and used these Benefits, and from the Social Security Administration ("SSA"), which made the disbursement to the State, the plaintiffs alleged violations of 42 U.S.C. § 407 and the Fifth and Fourteenth Amendments to the United States Constitution. Because important constitutional rights were involved, a three-judge court was impanelled.

Every patient who entered an Illinois Department of Mental Health ("DMH")[1] facility was subject to seizure of Disability Benefits by the State. A system incorporating two methods was employed for effectuating the seizure. If the entering patient was considered competent, the patient was asked to sign DMH Form 623, along with a host of other forms, upon entering the facility. The illegal form did not disclose to the patient that care would be provided regardless of whether the form was signed, nor that the agreement was revocable at any time, nor that the agreement covered Disability payments. The result of signing Form 623 was that all funds coming to the patient, including Disability Benefits, were then placed in a "trust fund" out of which the State of Illinois paid itself first, once a $400 minimum balance had been achieved. Thus, the patient was left with virtually no funds to pay for support of children, dependent spouses or others, or for other, more pressing needs. Because institutional charges always exceeded the amount of the Benefits, the practical result was that the patient was never left with more than $400, regardless of the duration the patient's commitment.

If the entering patient was determined to be incompetent, a determination made by the DMH personnel, the State obtained the patient's Disability Benefits by applying to the SSA for appointment of the DMH facility's superintendent as representative payee.[2] The payee then deposited the Benefits in the "trust fund" and the priority for institutional charges prevailed, with the State paying itself first.

Upon cross-motions for summary judgment, the three-judge court found that the State's use of Form 623 violated

---

[1] Currently the DMH is known as the Department of Mental Health and Developmental Disabilities.

[2] The three-judge court and the court of appeals expressly found that the procedures for appointment were "usually initiated by an application from the institution," not by the SSA. (Petitioner's Appendix ("App.") F-13)

the Supremacy Clause of the United States Constitution and 42 U.S.C. § 407, and that the procedures by which the State was appointed as representative payee violated due process standards under the Fifth and Fourteenth Amendments. The court ordered that specific remedial steps be taken to cure the violations.

In response to the court's order, the State amended Form 623 to comply with the court's direction. In particular, the revised Form 623 (Respondents' Appendix ["R. App."] A), unlike the old Form (App. G), expressly stated: 1) that the authorization to deposit Benefits into the trust fund could be revoked by the patient at any time, 2) that signing Form 623 was not a precondition to receipt of treatment at the institution, 3) that funds received from the SSA were included under Form 623, and 4) that Social Security Disability Benefits are not transferable or assignable nor subject to legal process, pursuant to 42 U.S.C. § 407.

At the same time the federal defendants revised the SSA procedures to prevent the State from being appointed as representative payee without due process of law. The district court reviewed the revised form and procedures and determined that the deficiencies had been cured.[3]

In 1980, after the district court determined that fees could not be assessed against federal defendants, the respondents filed a fee petition which did not include fees incurred on matters related solely to the federal defendants. The district court then assessed the balance of fees against the State, expressly finding that "the majority of time spent in litigating this case was devoted to claims which involved both state and federal defendants and that this time would not have been less had only the state been sued." (App. D-5 n. 2). In

[3]This review was made in response to the federal defendants' Motion to Alter or Amend the Judgment and the remand from the Seventh Circuit after the petitioner attempted to take an appeal. The Seventh Circuit determined that it had no jurisdiction at that time.

addition, the district court granted a 1.5 multiplier based on the importance of the results alone.

On appeal, the court of appeals for the Seventh Circuit affirmed every aspect of the district court's decision, except the 1.5 multiplier. In particular, the court of appeals found that every patient, competent and incompetent alike, was threatened by the Form 623 procedures upon admittance to a DMH facility and, therefore, regardless of the method by which that patient's Disability Benefits were ultimately confiscated by the State, the patient had been a victim of the "system" of confiscation and had "suffered the identical harm—deprivation of Social Security Benefits." (App. F-6). Therefore, the court of appeals concluded, the respondents had standing to challenge the system even though the specific means by which the injury was inflicted were different, depending on the competency of the patient. (App. F-6).

The court of appeals also found that Form 623 was an illegal transfer or assignment in violation of § 407 because it was not voluntary and did not leave the patient with sufficient control over the Disability Benefits to remove the Form from the ambit of § 407. (App. F-11).

Finally, the court of appeals affirmed the lodestar fee award because the plaintiffs had prevailed on both the issue of the illegality of Form 623 and the unconstitutionality of the representative payee procedures. (App. F-11). The court of appeals noted that the only matter on which plaintiffs had not prevailed was plaintiffs' alternative claim that the appointment of a representative payee was a *per se* violation of the Constitution. (App. F-11 n. 9).

The question of fees against the federal defendants was *not* raised in either the Appellant or Reply briefs. The applicability of the Equal Access to Justice Act was raised for the first time in the Petition for Rehearing En Banc. That Petition was denied unanimously by the Seventh Circuit.

REASONS FOR DENYING THE WRIT

The Petition requests that this Court review three issues: 1) the standing of respondents, 2) the assignment of Social Security Benefits by use of Form 623, and 3) the allocation of attorneys' fees. However, the Petition has failed to state any special or important reason for reviewing the decision of the court of appeals which upheld the district court's order, as required by Rule 17 of the Rules of the Supreme Court.

First, the standing of the respondents to bring this action is not challenged on the grounds of a conflict among the circuits or conflict with any decision of this Court. This case does not raise any important question of federal law that this Court has not previously decided regarding the standing requirements under Article III of the Constitution of the United States. While petitioners contend that the Seventh Circuit's ruling conflicts with this Court's decision in *Blum* v. *Yaretsky*, 450 U.S. 925 (1982), and *General Telephone Co.* v. *Falcon*, 454 U.S. 1097 (1982), both of these cases were specifically considered by the court of appeals and the court of appeal's decision is entirely consistent with this Court's holdings.

Second, petitioner does not contend that the use or non-use of a state form, DMH Form 623, is such an important federal issue that this Court's review is necessary. The only parties who would be concerned with the use or non-use of Form 623 are the parties involved in this case. Since the use of Form 623 is limited by the borders of the State of Illinois, there can be no conflict among the circuits regarding its use or non-use. Furthermore, petitioner has not contended that the decision of the district court and the affirmance by the court of appeals has so far departed from the accepted and usual course of judicial proceedings that this Court's power of supervision should be exercised.

Lastly, the decisions of the two lower courts regarding the allocation of attorney's fees comport with the rulings of

other circuits, the decisions of this Court, and the congressional intent of the legislature of the United States.

The Petition is a little more than a semantic exercise in which the petitioner attempts to put a favorable gloss on its system of confiscating the Social Security Benefits payments of mental patients—a characterization which was expressly rejected by both the district and appellate courts. The thrust of the Petition quibbles with the findings of fact by the district court, and not with the application of federal statutory or case law. This Court has repeatedly pronounced that "...it 'cannot undertake to revie · concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.'" *Berenyi* v. *District Director, Immigration and Naturalization Service*, 385 U.S. 630, 635 (1967). The factual findings were well within the district court's discretion, they were affirmed by the court of appeals, they were left intact upon consideration of the Petition for Rehearing En Banc and there is no need to require this Court to exercise its powers of supervision to review that exercise of discretion once again.

I. THE DISTRICT COURT'S FINDING THAT THE RESPONDENTS WERE THREATENED AND INJURED BY A SYSTEM FOR CONFISCATING BENEFITS, AND THE COURT OF APPEALS' AFFIRMANCE OF THAT FINDING, SATISFY THE STANDING REQUIREMENTS OF ARTICLE III.

Petitioner contends that the named representatives were not injured, or if they were injured, they did not suffer the same injury as the unnamed class members, and therefore they do not have standing to complain about the State of Illinois' illegal confiscation of Social Security Disability Benefits through this method. This contention is directly contrary to the findings of the courts below, which are amply supported by the record.

The "case or controversy" requirement of Article III of the Constitution of the United States is satisfied if the respondents were threatened with injury by petitioner's wrongful activities. *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99 (1979). As the district court correctly found and the court of appeals affirmed, every patient, competent and incompetent, was threatened by the use of Form 623:

> Every patient was threatened by the Form 623 procedures. In addition, whether a patient eventually signed the form (if found competent) or had a representative payee appointed (if found incompetent), the entire system resulted in the deprivation of the Social Security benefits of every patient. Every plaintiff was threatened by Form 623 upon entering the facility, every plaintiff was subject to the same system of deprivation, and in the end, every plaintiff suffered the identical harm—deprivation of Social Security benefits. Only the precise means by which the injury was inflicted were different. (App. F-6.)

One way or the other, the state actively and impermissibly diverted the Disability Benefits, and it was the State that benefited from this illegal activity. The threat of Form 623 was not a mere "possibility" of injury, as petitioner would characterize it; it was an actual and immediate threat of injury, consistent with this Court's rulings in *Golden* v. *Zwickler*, 394 U.S. 103 (1969), and *Baker* v. *Carr*, 369 U.S. 186 (1962).

The Seventh Circuit's ruling specifically considered and followed this Court's holdings in *Blum* v. *Yaretsky*, 450 U.S. 925 (1982), (App. F-6 to F-7) and *General Telephone Co.* v. *Falcon*, 454 U.S. 1097 (1982), (App. F-8). In both *Blum* v. *Yaretsky* and *General Telephone Co.* v. *Falcon* this Court was addressing the issue of the adequacy of the class representative under Rule 23(a) of the Federal Rules of Civil Procedure. This Court held in both cases that plaintiffs

suffering one injury could not properly represent unnamed plaintiffs suffering different injuries.[4]

In this case, as the district court and the court of appeals found, the class members, named and unnamed, suffered the *identical injury*: deprivation of Disability Benefits (App. F-6 to F-7).[5] The named representatives had personal standing because they were threatened and injured by a system that confiscated their Disability Benefits. They may seek class-

---

[4]The court of appeals expressly noted that the named plaintiffs in *Blum* v. *Yaretsky*, who were being moved to a *lower* care facility, were challenging the deprivation of medicare benefits. However, they were also attempting to represent unnamed plaintiffs who were being moved to a *higher* care facility. The Court noted that while the move to a lower care facility would typically involve a decrease in medicare benefits, no such injury was suffered by patients being moved to a higher level of care; the latter group of patients were receiving *more*, not *less*, care. Therefore, the named plaintiffs could not represent patients who were not suffering this injury.

In *General Telephone Co.* v. *Falcon*, the Court held that the named plaintiff who claimed discrimination in promotion could not represent a class claiming discrimination in *both* promotion and hiring because these two injuries were different in nature and this difference actually created a conflict in the interests between these groups. Therefore, a plaintiff who had been injured by a wrongful denial of promotion could represent a class of persons who had been discriminated against in promotions, but not a class of persons injured by discrimination in hiring. The requirements of Rule 23(a) were not satisfied where different types of injury had been inflicted and such a conflict existed.

[5]Petitioner confuses the *method* used by the state with the *injury* suffered by respondents. (Pet. at 18 n.1). The use of DMH Form 623 and the appointment of a representative payee are methods used by the State in its attempt to obtain the uniform result of seizure of the Disability Benefits from the class members. The courts below found these methods were simply two "prongs" of a single "system of deprivation." (App. F-6 n.5).

wide relief from the full system of methods by which every entering mental patient was threatened and which was used by the State to accomplish its illegal seizure. Petitioner's argument for a writ of certiorari does no more than take issue with the findings of fact of the district court, which were affirmed by the court of appeals. Both courts found that the system was a unified one and that every mental patient was threatened by that system.

The Petition does not contend that the rulings below are in conflict with the holdings in other circuits or that they raise important questions of federal law not previously decided by this Court. To the contrary, the rulings below are based upon findings of fact well within the discretion of the lower court, affirmed by the court of appeals, and amply supported by the record.

II. THE USE OF DMH FORM 623 WAS AN ILLEGAL ASSIGNMENT OF SOCIAL SECURITY BENEFITS, AS THE THREE-JUDGE COURT AND THE COURT OF APPEALS CORRECTLY FOUND.

Petitioner contends that this Court's holding in *Philpott* v. *Essex County Welfare Board*, 409 U.S. 413 (1973), is not controlling. Petitioner misconstrues the stern prohibitions announced in *Philpott*:

> [T]he Social Security Act of § 407 bars the State of New Jersey from reaching the federal disability payments paid to Wilkes. The language is all inclusive: '(N)one of the money paid or payable . . . under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process' *** [I]t imposes a broad bar against the use of any legal process to reach all social security benefits. That is broad enough to include all claimants, including a state.

409 U.S. at 415-17.

Petitioner also claims that *Philpott* did not address the issue of whether § 407 precludes Disability Benefits from

being used by the State for "precisely the purpose which Congress intended—the payment of *current* care and maintenance costs." Petition at 21. However, as the court of appeals specifically found, *"Philpott* forecloses the State's argument that Section 407 does not apply when the benefits are used for the purpose for which they are granted." (App. F-9 n. 6).

Petitioner cites *Moore* v. *Colautti*, 483 F. Supp. 357 (E.D. Pa. 1979), *aff'd*, 633 F.2d 210 (3d Cir. 1980); *French* v. *Director, Michigan Dept. of Social Services*, 92 Mich. App. 701 (1979); and *Tunnicliffe* v. *Commonwealth of Pennsylvania Dept. of Public Welfare*, 483 Pa. 275 (1978), for the proposition that Form 623 is valid. Again petitioner is doing nothing more than taking issue with the findings of fact. As the court of appeals held:

> *Moore, French* and *Tunnicliffe* are distinguishable from the facts in the instant case and we do not believe they support the State's position. The agreements were nothing more than an obligation to pay back a loan and they did not delineate the source of the repayment. The agreements did not subject Social Security Benefits to any legal process nor did they transfer control of Social Security benefits to the State. Most importantly, unlike Form 623, these agreements did not result in monthly Social Security checks actually being received and disbursed by the state agency. If a recipient from *Moore, French*, or *Tunnicliffe* chose not to repay the local agency, the Social Security Funds could not be reached. In the instant case, the recipients had no choice of whether to pay the state for the service they received; the state received and cashed their checks. Further, the DMH was obligated to pay its own expenses first when a trust was created pursuant to Form 623, putting the state in the position of a preferred creditor; a position found illegal by the Supreme Court in *Philpott*. (App. F-10 to F-11).

Finally, petitioner contends that under Illinois law, Form 623 was not an assignment. But, as the court of appeals

correctly pointed out in affirming the district court's finding, the Form did operate as an assignment:

> The restrictive definition of assignment based on Illinois law advanced by the State ignores the language and the purpose of Section 407. An agreement need not have permanence or transfer complete control of disability benefits before it falls within the ambit of Section 407. (App. F-9).[6]

These findings and the interpretation of state law which were rendered by the district court and affirmed by the court of appeals are not appropriate subjects on which to invoke this Court's further review.

III. THE FEE AWARD UNDER 42 U.S.C. § 1988 WAS A PROPER EXERCISE OF THE DISTRICT COURT'S DISCRETION BECAUSE RESPONDENTS WERE PREVAILING PARTIES AGAINST THE PETITIONER ON BOTH THE REPRESENTATIVE PAYEE AND FORM 623 ISSUES.

In enacting the Civil Rights Attorneys Fees Act of 1976, 42 U.S.C. § 1988, Congress intended to compensate attorneys who are serving the public interest by protecting basic rights and to encourage people to seek redress of constitutional injuries. Congress expressly affirmed the concept that a successful litigant is ordinarily presumed to be entitled to fees under the Act. *See* S.Rep. 94-1011 at p. 4; H. Rep. 94-1558 to accompany H.R. 15460, the House version of the bill, 94th Cong., 2d Sess. p 6. *See also Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968).

---

[6]The lower courts agreed that the Form formerly used by petitioner was: (1) not voluntary, (2) transferred Disability Benefits directly to the control of petitioner, (3) resulted in the respondents losing total control over the use of their Social Security Benefits, and 4) gave no notice to respondents of the legal results of signing the form. (App. F-11)

The courts of appeals have held that in order to be entitled to fees under § 1988, the plaintiffs must prevail "in a practical sense," *Dawson* v. *Patrick*, 600 F.2d 70, 78 (7th Cir. 1979).[7] *See also Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970) (where the court ordered that fees be awarded to plaintiffs whose suit had served as a catalyst in obtaining relief from certain employment practices, even though the effort to obtain injunctive relief and back pay was unsuccessful). As the court said in *Muscare* v. *Quinn*, 614 F. 2d 577, 580 (7th Cir. 1980), "the circumstances of each case must be individually considered in determining who is the prevailing party."

This lawsuit brought about practical relief from all of the procedures it challenged. The district court expressly recognized that respondents had brought about needed relief for the whole class of Illinois State mental patients, and had caused the defendants to change their procedures in a way that would provide substantial benefit to mental patients in all state institutions. *See* App. D-3.

The Seventh Circuit agreed with the district court that respondents succeeded in obtaining class-wide relief on virtually every issue. Disability funds are now secure from unlawful seizure regardless of the patient's competency, and that protection was achieved for the class of all mental patients who enter an Illinois facility. Further, as the district court found, the question of whether or not institutions may be appointed representative payee is so completely intertwined with the question of the unlawfulness of the assignment and related issues on which plaintiffs expressly prevailed, *see* App. D-5, that to disallow a percentage of the attorneys fee on that point would severely chill the strategic

[7] In *Dawson*, although the plaintiffs did not obtain the fullest relief they sought, the Seventh Circuit found that they had prevailed on their § 1981 claim by obtaining an order directing the affirmative recruitment of minorities. Thus, fees were to be awarded.

choices an attorney makes and which the Civil Rights Attorneys Fee Act of 1976 is designed to encourage.

Petitioner contends, *ipse dixit*, that respondents did not prevail against the State on the issue of the representative payee scheme.[8] Contrary to this contention, the district court expressly found and the court of appeals expressly agreed that the State had participated in a civil conspiracy with the federal defendant in the appointment of a representative payee.[9] The court stated, "it is not necessary for the state defendant to have had control over the illegal procedures when the DMH willingly participated in and benefited from the procedures." (App. F-13). In obtaining relief from the illegal representative payee procedure, the respondents prevailed over the petitioner in a practical and important sense. As a result of the respondents' success on this issue, the State is no longer able to have itself appointed payee for the patient and thereby seize the patient's benefits without due process of law.

The Petition fails to show that the district court abused its broad discretion in awarding civil rights attorneys fees, or that the court of appeals improperly approved that exercise of discretion. *See Lindy Bros. Builders, Inc.* v. *American Radiator and Standard Sanitary Corp.*, 487 F.2d 161, 166 (3d

[8]The appointment of the representative payee was usually initiated by the State through the DMH institution superintendent, who applied to be appointed representative payee. The court of appeals stated, "the DMH set in motion a series of acts where the reasonable outcome was a constitutional injury." (App. F-13 to F-14).

[9]As the court of appeals stated, "The State's assertion of innocence is directly controverted by the findings of the district court. The court found that a conspiracy existed between the state and federal defendants .... In the instant case, the illegal diversion of Social Security benefits from the plaintiffs to the state defendant was the common conspiratorial objective.... the DMH's participation in a conspiracy is clearly established by the record." (App. F-12 to F-13).

Cir. 1973). The findings of fact and conclusions of law made by the courts below are in conformity with those of other circuits and with the intent and purpose of § 1988.

Petitioner suggests that *Hensley* v. *Eckerhart*, 455 U.S. 988 (No. 81-1244, *cert. granted* March 1, 1982), might change the result in this case. In *Hensley*, the plaintiffs prevailed on four of six alleged constitutional violations.[10] In this case there was only one constitutional injury—seizure of Disability Benefits—and respondents prevailed in eliminating this illegal seizure by both of the illegal methods used by the State. Thus, respondents have prevailed here in a practical sense on virtually every issue that was raised. The only matter on which they did not prevail was the alternative contention that the appointment of the State as representative payee was a *per se* constitutional violation. While not obtaining the fullest measure of relief possible on this matter, respondents prevailed on the claim as a whole by forcing modification of the payee system to provide mental patients with due process whenever the State sought to have itself appointed as representative payee.

The Seventh Circuit has adopted the rule that fees may be awarded for only those issues where plaintiffs prevail.[11] *See, e.g., Muscare* v. *Quinn*, 614 F.2d 577 (7th Cir. 1980); *Johnson* v.

[10] In *Hensley* v. *Eckerhart*, the plaintiffs alleged that they were being injured by: 1) a lack of privacy, 2) lack of adequate climate control in the buildings, 3) lack of adequate bathroom facilities, 4) inadequate furnishings, 5) absence of individual treatment plans, and 6) inadequate numbers of qualified staff.

The district court found violations of plaintiffs' constitutional rights as to the first four injuries but not as to the last two.

[11] Respondents disagree with the proposition that under the Civil Rights Attorneys Fees Act plaintiffs should recover all their fees *only* when they prevail on every issue. Respondents believe that such a rule would discourage attorneys from undertaking important but difficult civil rights cases in the public interest. However, this rule of proportionality has no application to this case, where the respondents did prevail by

(footnote continued on next page)

Brelje, ___ F.2d ___ (7th Cir., February 18, 1983).[12] Even with the proportionate-fee-award rule, the Seventh Circuit agreed with the district court in the instant case that the respondents had "achieved broad remedial relief" for all Illinois mental patients, and that respondents had been "instrumental in prompting substantial changes in the procedures for disbursement of disability benefits to mental patients." (App. F-11).

As the court of appeals applied the proportionate theory in *Johnson*, it would have reduced the fees in *Tidwell* had it found that respondents had *not* substantially prevailed on all the central issues. To the contrary, the Seventh Circuit expressly found that the district court had correctly ruled that both Form 623 and the representative payee procedure were illegal, that by participating in these procedures the petitioner had violated statutory and constitutional rights of the class members and that the respondents had substantially prevailed.

There can be no question that respondents prevailed in a practical sense in causing a complete overhaul in the entire system of confiscation of Disability Benefits for Illinois

---

(footnote continued from preceding page)

obtaining relief from the entire system of confiscation, including both the use of Form 623 and the representative payee procedure.

[12] In *Johnson*, the plaintiffs in a class action challenged the procedure of automatically assigning all male defendants who were found unfit to stand trial to a certain mental health center and a number of restrictions at the facility.

The Seventh Circuit affirmed the unconstitutionality of the initial assignment but found that the plaintiffs had not prevailed on their contentions that the law library was inadequate or that their freedom of movement had been unconstitutionally restricted. On the issue of fees, the Seventh Circuit held that the class should only be awarded attorney's fees on the successful claims. They had obtained no relief whatsoever with regard to the law library or their freedom of movement.

mental patients. The respondents are entitled to the modest fee award granted by the district court.

IV. FEES AWARDED AGAINST STATE DEFENDANTS MAY NOT BE REDUCED PURSUANT TO THE EQUAL ACCESS TO JUSTICE ACT.

At the time the fee petition was submitted for the district court's approval, the Equal Access to Justice Act ("EAJA") had not been enacted. Pursuant to then-controlling case law, holding that fees could not be recovered from federal defendants, the district court dismissed the fee petition as against the federal defendants. The district court thereafter assessed fees against the petitioner for only the time which was required in litigating against the State. (App. D-5 n.2).

In granting fees against the State, the district court noted that the respondents' fee request had excluded all time spent solely on matters involving the federal defendants. (App. D-5). The EAJA did not become effective until late 1981, when the appeal by only the State was pending. That appeal did not include any claim under the EAJA.

Petitioner is suggesting that despite the fact that the EAJA was enacted months after the district court's order had become final as to the federal defendants, the State has somehow been harmed, even though it has not been assessed any fees for which it was not liable. Certainly the EAJA should not be used for the anomalous purpose of depriving prevailing civil rights plaintiffs of their fees.[13]

[13] Although respondents do not care whether their fees are paid by the State of Illinois or by the United States, respondents strongly urge that the decision of the court of appeals not be remanded on the issue of fees. Any remand will cause delay and expense and thus result in a substantial injustice to the respondents, the very parties which the Equal Access to Justice Act was intended to protect. Such manifest injustice precludes retroactive application of the statute under the circumstances of this case.

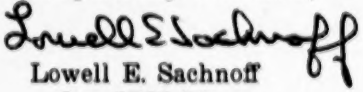
Because fees attributable to the federal defendants have already been eliminated in this case, this is a uniquely inappropriate case in which to ask this Court to render an opinion on the question of the application of the EAJA to cases where the federal government and other parties have been joint defendants.

CONCLUSION

No reason having been shown why a writ of certiorari should issue, it is respectfully submitted that the Petition should be denied.

Dated: March 17, 1983

Respectfully submitted,



Lowell E. Sachnoff
One IBM Plaza
Chicago, Illinois 60611
(312) 644-2400

Of Counsel:

Andrew M. Schatz
Fay Clayton
William H. Taylor II
SACHNOFF WEAVER & RUBENSTEIN, LTD.
One IBM Plaza
Chicago, Illinois 60611
(312) 644-2400

Kathleen C. Yannias
CHICAGO LAWYERS COMMITTEE FOR
CIVIL RIGHTS UNDER LAW, INC.
220 South State Street
Chicago, Illinois 60604
(312) 939-5797

Counsel for Respondents

State of Illinois
Department of Mental Health
Developmental Disabilities

AUTHORIZATION

I, _____ (patient's name) _____, being a patient at _____ (facility name) _____, hereby knowingly consent to the deposit in the facility trust fund, to my account, of all monies received by me during my stay at the facility. I understand that these funds will be disbursed by the facility Superintendent on my behalf for my maintenance, treatment, services, clothing, personal purchases and other necessities, and I understand that this applies to funds received by me from federal agencies, including the Social Security Administration. In consenting to the use of these funds for the recited purposes, I also understand the following:

1. That this consent may be revoked at any time by me, by giving the facility written notice of such revocation.

2. That execution of this Authorization is not a precondition to the receipt of treatment.

3. That 42 U.S.C. § 407, dealing with Social Security disability payments, provides as follows:

> "The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable as rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law."

I further understand that any balance remaining in my account will be returned to me upon my discharge from the facility, after all outstanding charges have been determined

and paid in accord with applicable rules and regulations of the Department.

_____

(signed)

Date: _____

Witness: _____

Date: _____